

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Signed

75-6061

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTHONY A. BERSANI,

Plaintiff-Appellant

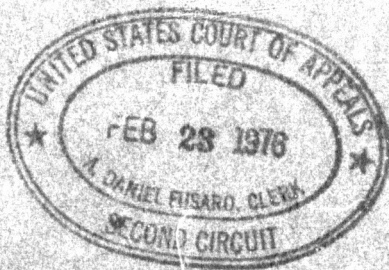
v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
ELMER J. KILSEY,
JEFFREY S. BLUM,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

JAMES M. SULLIVAN, JR.,
United States Attorney.

TABLE OF CONTENTS

| | Page |
|---|------|
| Statement of the issue presented----- | 1 |
| Statement of the case----- | 1 |
| Summary of argument----- | 6 |
| Argument: | |
| The District Court correctly found that taxpayer was a responsible person who willfully failed to collect and pay over withholding taxes within the meaning of Section 6672 of the Internal Revenue Code of 1954 and therefore was liable to the Government for the amount of the unpaid withholding taxes----- | 8 |
| Conclusion----- | 17 |
| Appendix----- | 18 |

CITATIONS

Cases:

| | |
|--|----|
| <u>Adams v. United States</u> , 504 F. 2d 73 (C.A. 7, 1974)----- | 14 |
| <u>Bloom v. United States</u> , 272 F. 2d 215 (C.A. 9, 1959)----- | 9 |
| <u>Botta v. Scanlon</u> , 314 F. 2d 392 (C.A. 2, 1963)----- | 10 |
| <u>Braden v. United States</u> , 442 F. 2d 342 (C.A. 6, 1971), cert. denied <u>sub nom.</u> <u>Bonistall v. Braden</u> , 404 U.S. 912 (1971)----- | 15 |
| <u>Burack v. United States</u> , 461 F. 2d 1282 (Ct. Cl., 1972)----- | 15 |
| <u>Commissioner v. Duberstein</u> , 363 U.S. 278 (1959)----- | 10 |
| <u>Dillard v. Patterson</u> , 326 F. 2d 302 (C.A. 5, 1963)----- | 8 |
| <u>Frazier v. United States</u> , 304 F. 2d 528 (C.A. 5, 1962)----- | 13 |
| <u>Genins v. United States</u> , 489 F. 2d 95 (C.A. 5, 1974)----- | 9 |
| <u>Harrington v. United States</u> , 504 F. 2d 1306 (C.A. 1, 1974)----- | 14 |
| <u>Horwitz v. United States</u> , 339 F. 2d 877 (C.A. 2, 1965)----- | 9 |
| <u>Kalb v. United States</u> , 505 F. 2d 506 (C.A. 2, 1974)----- | 10 |

Cases (continued):

| | |
|--|---------|
| <u>Monday v. United States</u> , 421 F. 2d 1210 (C.A. 7, 1970), cert. denied, 400 U.S. 821 (1970)----- | 9,10 |
| <u>Mueller v. Nixon</u> , 470 F. 2d 1348 (C.A. 6, 1972)----- | 14 |
| <u>Newsome v. United States</u> , 421 F. 2d 742 (C.A. 5, 1970)----- | 9 |
| <u>Pacific National Insurance v. United States</u> , 422 F. 2d 26 (C.A. 9, 1970), cert. denied, 398 U.S. 937 (1970), rehearing denied, 400 U.S. 883 (1970)----- | 9,13,14 |
| <u>Sorenson v. United States</u> , 521 F. 2d 325 (C.A. 9, 1975)----- | 11,12 |
| <u>Spivak v. United States</u> , 370 F. 2d 612 (C.A. 2, 1967)----- | 9 |
| <u>United States v. Algernon Blair, Inc.</u> , 441 F. 2d 1379 (C.A. 5, 1971)----- | 13 |
| <u>Werner v. United States</u> , 374 F. Supp. 559 (Conn., 1974), aff'd, 512 F. 2d 1381 (C.A. 2, 1975)----- | 9,14 |
| <u>White v. United States</u> , 372 F. 2d 513 (Ct. Cl., 1967)----- | 9 |

Statutes:

| | |
|--|------|
| Internal Revenue Code of 1954 (26 U.S.C.): | |
| Sec. 3102----- | 8,18 |
| Sec. 3402----- | 8,18 |
| Sec. 3505----- | 13 |
| Sec. 6671----- | 9,19 |
| Sec. 6672----- | 8,19 |
| Sec. 7501----- | 8,19 |

15

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-6061

ANTHONY A. BERSANI,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court correctly found that taxpayer was a responsible person who willfully failed to collect and pay over withholding taxes within the meaning of Section 6672 of the Internal Revenue Code of 1954 and therefore was liable to the Government for the amount of the unpaid withholding taxes.

STATEMENT OF THE CASE

Anthony A. Bersani (hereinafter taxpayer) brought this suit to recover from the United States \$212.54 which he had paid pursuant to an assessment of a 100 percent penalty under Section 6672 of the Internal Revenue Code for willfully failing to pay

over withholding taxes totaling \$19,273.04. (Op. 1-2.)^{1/} These taxes had been withheld from the wages of employees of Auto Dynamics of Syracuse, Inc., during the fourth quarter of 1963 and the third quarter of 1964. (Op. 2.) The United States filed a counterclaim against taxpayer for the balance of the assessment.^{2/} Based on its Memorandum Decision and Order of November 18, 1974, unofficially reported at 75-1 U.S.T.C., par. 9103, the District Court (Judge Port) on April 30, 1975, entered judgment in favor of the United States and against the taxpayer in the amount of \$10,308.90 plus interest. Taxpayer timely filed his notice of appeal on June 11, 1975. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1291.

The pertinent facts may be summarized as follows:

Taxpayer is a lawyer, real estate manager and developer who had a financial interest in, and participated in, several real estate companies, among them Primex Equities Corporation. Through Primex, taxpayer promoted an automotive center known as the Midtown Car Center. The concept of the car center was that several independent automotive shops would be housed in one building to service customers. Taxpayer, in his role as president of Primex, was the landlord of the shops which occupied the car center. (Op. 2; Tr. 9.)

^{1/} References are to the documents comprising the original record on appeal as reproduced in part in the unpaginated record appendix.

^{2/} The counterclaim originally sought to apply the 100 percent penalty to wages withheld during the fourth quarter of 1964. Pursuant to the stipulation of the parties, this portion of the counterclaim was later dismissed.

Since the success of the car center was important to taxpayer, because its failure would cause the loss of a mortgage commitment on the Primex Office Building in which he held a vital interest, taxpayer established Auto Dynamics to oversee the operation of the car care center. Auto Dynamics was also to be the first stop at the car center, where a car's problems would be diagnosed and referred to the various specialty shops in the center for repair and service. (Tr. 21-22; Op. 2.)

Taxpayer envisioned Auto Dynamics as the controlling point of the enterprise. Thus he intended to control Auto Dynamics through ownership of its stock with a Mr. Low. Taxpayer was advised, however, by his New York City legal counsel that ownership of Auto Dynamics stock, coupled with ownership in Primex, would violate Securities and Exchange Commission rules. Accordingly, he issued instructions to his counsel to put ownership of the Auto Dynamics' stock in the name of his wife and in Mrs. Low's name. (Op. 2-3.) He also designated as officers of Auto Dynamics certain employees of Auto Dynamics, who were paid by other taxpayer-controlled companies.

Taxpayer was not a stockholder, officer or director of Auto Dynamics. Yet at trial it was demonstrated that he played an active role in its affairs: (1) At its inception, Auto Dynamics had little or no capital. (Op. 3.) Accordingly, taxpayer lent the company funds to finance its ongoing operations. (Tr. 25, 96, 167-168, 194.) (2) Weekly reports of the company's financial condition were transmitted to taxpayer and he determined which

creditors should be paid. (Tr. 98, 102; Op. 3-4.) (3) During December of 1973, taxpayer arranged for MKC Tire Corporation, another enterprise controlled by taxpayer and located in the Car Center, to borrow \$20,000 so that Auto Dynamics could pay its delinquent withholding taxes. Of this loan, \$17,000 was paid instead to taxpayer. (Tr. 100-101, 165-167; Op. 4.) (4) On other occasions taxpayer actually paid the company's delinquent withholding taxes. (Tr. 187.) (5) Taxpayer hired and fired Auto Dynamics' key employees. (Op. 3.) He hired Ronald Slepan, who was paid by the Bersani Realty and Construction Company, as president of Auto Dynamics. (Tr. 11-12, 31, 93-94.) In August of 1963, taxpayer hired John W. Hildebrand as the company comptroller and told him what his salary would be. (Tr. 159-160.) Hildebrand did not meet Slepan until the first day he reported for work. (Tr. 95, 173.) Taxpayer eventually fired Hildebrand and John Petrucci, the company's vice-president (Tr. 44, 171-172), and he also transferred Aubrey Tambs from his position as a bookkeeper with Bersani Realty Corporation to Auto Dynamics, where he performed the same function (Tr. 39-40).

Auto Dynamics paid certain of its creditors during the period in question while allowing withholding taxes to remain unpaid. (Op. 4.) At trial, it was shown that the employees of Auto Dynamics were regularly paid during the periods in question. (Tr. 97, 167, 195-197.) Bank statements (Ex. 3) for Auto Dynamics for the fourth Quarter of 1963, which reflect the movement of thousands of dollars through this account, were also introduced

and the Government introduced (Ex. C-1 through C-21) cancelled checks of the corporation which represent payments to creditors, other than the Government, in amounts several times the amount in dispute during the period in question.

Taxpayer left Primex sometime in the fall of 1964 (Tr. 54-55), and the United States eventually assessed against taxpayer a 100 percent civil penalty totaling \$19,273.04. Taxpayer paid \$212.64 of the assessment and filed a claim for refund which was denied. Taxpayer then brought this suit and the United States counterclaimed for the remainder of the assessment. (Op. 1-2.) The District Court found that taxpayer was a person responsible for the collection of withholding taxes from employees of Auto Dynamics during the third quarter of 1964 and the fourth quarter of 1963, who had willfully failed to pay those taxes over to the Government, and entered judgment for the United States in the amount of \$10,308.90 plus interest.^{3/}

From this decision the taxpayer appeals.

^{3/} The difference between the amount awarded to the United States and the amount for which the United States had counterclaimed is attributable to credits for taxes paid and the dismissal of the Government's counterclaim for withholding taxes for the fourth quarter of 1964.

SUMMARY OF ARGUMENT

Section 6672 of the Internal Revenue Code of 1954 provides that any person who is required to collect, account for and pay over taxes and who willfully fails to do so is subject to a penalty equal to the amount of the tax not collected, accounted for or paid over. As the courts have consistently held, the provisions of Section 6672 are directed toward holding those individuals who have the final word as to what bills or creditors should be paid personally accountable for the decisions they make. A responsible person within the meaning of Section 6672 is not invariably the one who prepares the tax return, keeps the books and records, or pays the wages. Indeed, an entity or person need not necessarily even be an officer or employee of the corporation to be a responsible person. All that is required by the statute is that a person have the final word as to which creditors shall be paid.

Taxpayer here clearly was a responsible person within the meaning of Section 6672. As a person vitally interested in the success of Auto Dynamics, taxpayer played an active role in the corporation's affairs. Aside from hiring and firing the corporation's key employees, he received weekly reports of the company's financial condition and he would then determine which of the creditors should be paid. Taxpayer admits that he would pay portions of Auto Dynamic's payroll and pay other creditors of the company even though the company's payroll withholding taxes

were delinquent. Although taxpayer argues that since the funds he advanced were his personal funds he cannot be a responsible person, it has been recognized that personal funds become funds of the corporation when they are used to pay corporate obligations, and that the payment of net wages in circumstances where there are no available funds in excess of net wages from which to make withholding is a willfull failure to collect and pay over under Section 6672.

Finally, the taxpayer's claims that the corporation did not have sufficient funds to pay the delinquent withholding taxes is without merit. The corporation's bank statements and cancelled checks clearly show that the corporation had sufficient funds during the periods in question to pay the delinquent withholding taxes.

Accordingly, the judgment of the District Court is supported by the evidence and should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY FOUND THAT TAXPAYER WAS A RESPONSIBLE PERSON WHO WILLFULLY FAILED TO COLLECT AND PAY OVER WITHHOLDING TAXES WITHIN THE MEANING OF SECTION 6672 OF THE INTERNAL REVENUE CODE OF 1954 AND THEREFORE WAS LIABLE TO THE GOVERNMENT FOR THE AMOUNT OF THE UNPAID WITHHOLDING TAXES

Section 6672 of the Internal Revenue Code of 1954, Appendix, infra, provides that any person who is required to collect, account for and pay over taxes and who willfully fails to do so is subject to a 100 percent penalty equal to the amount of the tax not collected, accounted for or paid over. The intent of Congress in enacting this provision is clear. Sections 3102 and 3402 of the Internal Revenue Code of 1954, Appendix, infra, require every employer to withhold federal income and social security taxes from the wages of his employees. The amounts withheld constitute a special trust fund for the United States. Sec. 7501, Internal Revenue Code of 1954, Appendix, infra. Where an employer has withheld a tax but failed to pay it over to the United States, the employee is credited with the amount withheld, and no additional payment from the employee is required. Unless the Government has recourse for collection of the tax from either the employer or a person responsible, the tax will be lost. Dillard v. Patterson, 326 F. 2d 302 (C.A. 5, 1963).^{4/} Thus, in enacting Section 6672, Congress was interested in protecting

^{4/} Indeed, if an employee subsequently shows in his tax return that he is entitled to a refund of withheld taxes (a very common occurrence), the Government is required to refund to him amounts which the Government has in fact, because of the improper conduct of the responsible officer, never received.

the revenue by permitting collection from those responsible persons who caused the diversion in the event that the corporation did not pay the withholding taxes. Spivak v. United States, 370 F. 2d 612 (C.A. 2, 1967).

The courts have recognized that a responsible person, within the meaning of Section 6672, is one who has the final word as to which bills or creditors should be paid and when. Horwitz v. United States, 339 F. 2d 877 (C.A. 2, 1965); Bloom v. United States, 272 F. 2d 215 (C.A. 9, 1959); Monday v. United States, 421 F. 2d 1210 (C.A. 7, 1970), cert. denied, 400 U.S. 821 (1970); Newsome v. United States, 431 F. 2d 742 (C.A. 5, 1970). Thus, it is not necessary that a responsible person be the one who has prepared the tax return, kept the books and records or paid the wages. Werner v. United States, 374 F. Supp. 559 (Conn., 1974), aff'd, 512 F. 2d 1381 (C.A. 2, 1975); White v. United States, 372 F. 2d 513 (Ct. Cl., 1967); Genins v. United States, 489 F. 2d 95 (C.A. 5, 1974). Indeed, while Section 6671(b), Appendix, infra, defines a "person" in this context to include "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty" to pay over withheld taxes, an entity or person need not even be an officer or employee of the corporation to be a responsible person. So long as he has final word as to who shall be paid, a person qualifies as a "responsible" person under Section 6672. Werner v. United States, supra; Pacific National

Insurance v. United States, 422 F. 2d 26, 30 (C.A. 9, 1970), cert. denied, 398 U.S. 937 (1970), rehearing denied, 400 U.S. 883 (1970); cf. Botta v. Scanlon, 314 F. 2d 392 (C.A. 2, 1963). In order for the requisite "willfulness" to be found, there is no need to find evil motive or specific intent to deprive the Government of revenue; "reasonable cause" or "justifiable excuse" are irrelevant in this context. All that is required is that the responsible person use corporate funds to pay creditors other than the United States, knowing that amounts were then due to the United States. Monday v. United States, supra, 421 F. 2d, p. 1216; Kalb v. United States, 505 F. 2d 506 (C.A. 2, 1974).

The evidence presented below compelled the finding of the District Court that taxpayer was a responsible person who willfully failed to pay over the taxes within the meaning of Section 6672. This finding will not be reversed if not clearly erroneous. Commissioner v. Duberstein, 363 U.S. 278 (1959). It is undisputed that taxpayer, in his role as president of Primex Equities Corporation, became landlord of the Midtown Car Center and established Auto Dynamics in order to oversee the operation of the car center. (Op. 2.) The success of the car center was important to taxpayer because its failure would cause the loss of a mortgage commitment on the Primex Office Building, in which the taxpayer held a vital interest. (Tr. 21-22.) Accordingly, taxpayer, even though he was not formally an officer, shareholder or director of the company, played an active role in

the company's affairs. Taxpayer hired the key employees of Auto Dynamics, arranged for them to be paid by other enterprises which he controlled and eventually fired those key employees. (Op. 2-3; Tr. 31, 39-40, 102.) Taxpayer was also actively involved in running the company's financial affairs. Each week he received reports of the company's financial condition and he would then determine which of the creditors should be paid. (Tr. 98, 102; Op. 3-4.) During December of 1973, taxpayer arranged for MKC Tire Corporation, another enterprise controlled by taxpayer and located in the Car Center, to borrow \$20,000 so that Auto Dynamics could pay its delinquent withholding taxes. Taxpayer, however, received \$17,000 of this loan. (Tr. 100-101, 165-167; Op. 4.)

Taxpayer admits (Br. 5, 9) that he would pay portions of Auto Dynamic's payroll and pay other creditors of the company, even though the company's payroll withholding taxes were delinquent. We submit that this admission by taxpayer amounts to a concession of his case because he admits that he willfully failed to pay over taxes--a clear violation of his statutory responsibilities--penalized by Section 6672. Yet taxpayer argues that, since the funds he advanced to pay net payroll and other creditors of the company were his personal funds rather than those of the company, he cannot be a responsible person under Section 6672. This same contention, in a situation almost identical to that presented here, was rejected by the Ninth Circuit in Sorenson v. United States, 521 F. 2d 325 (1975). In Sorenson, the sole shareholder of a corporation advanced personal

funds to the corporation and these funds were used to pay the net wages of the employees. In holding that such actions made the taxpayer in Sorenson a "responsible person" within the meaning of Section 6672, the Ninth Circuit first stated that (521 F. 2d, p. 327)--

Sorenson's personal funds became "funds of the corporation" when they were used to pay net salaries of the employees of the corporation. * * * The use to which the funds were put, viz. the payment of corporate obligations, transformed Sorenson's personal funds into "funds of the corporation."

The court recognized (p. 328) that to hold otherwise "would permit the principal and managing shareholder of such a closely held corporation to immunize both it and himself from all withholding responsibility." The court then explored the question whether the payment of net wages made one liable under Section 6672. It stated (521 F. 2d, p. 328):

We hold that the payment of net wages in circumstances where there are no available funds in excess of net wages from which to make withholding is a willful failure to collect and pay over under § 6672.

* * * Employees to whom wages are owed are but a particular type of creditor. There is no basis in law for preferring the wage obligations to them over the withholding obligation to the Government. One who has voluntarily disabled himself from meeting this tax obligation by using all funds for wages has engaged in a "willful" act.

The proper course for those, such as Sorenson, who have scarce resources is to prorate such funds as are available between the Government and the employees. * * *

The unmistakable consequence of our holding, therefore, is to require the employer to prefer the United States over his workers.

Cf., Frazier v. United States, 304 F. 2d 528 (C.A. 5, 1962), and United States v. Algernon Blair, Inc., 441 F. 2d 1379 (C.A. 5, 1971).^{5/}

The fact that taxpayer was not an officer, director or shareholder of the corporation does not shield taxpayer from the liability imposed by Section 6672. In Pacific National Insurance v. United States, 422 F. 2d 26 (C.A. 9, 1970), the taxpayer was a corporate surety which exercised control over funds belonging to an employer and determined which creditors were to be paid. The employer could not pay out funds without the surety's permission. The Ninth Circuit rejected taxpayer's contention that it was not a person within the meaning of Section 6672 (pp. 30, 31):

* * * it is our conclusion that the language of these provisions is broad enough to reach an entity which assumes the function of determining whether or not an employer will pay over taxes withheld from its employees; * * * this reading of the language serves the evident purpose of the statute; * * *.

* * *

^{5/} See also Section 3505 which imposes liability on a third person who furnishes funds with the knowledge and intent that they are to be used to pay only the net wages of corporate employees. While this section was only intended to extend liability to third persons who pay net wages, it would be inconsistent for Congress to intend to allow persons responsible under Section 6672 to escape personal liability for paying net wages and make third parties who pay net wages liable for the taxes lost.

* * * it is evident from the face of
* * * [Section 6672] that it was designed
to cut through the shield of organizational
form and impose liability upon those actually
responsible for an employer's failure to with-
hold any pay over the tax. It would frustrate
this purpose needlessly to imply a condition
limiting the application of the section to
those nominally charged with controlling dis-
bursements of a corporate employer, thus
immunizing those who, through agreement with
or default of those nonimally responsible,
have exercised this corporate function in fact.

Thus, in its role as a lender, Pacific had exercised such control
over the debtor's financial affairs during the tax periods in
issue that it was held to have become a person responsible for
the debtor's failure to pay over taxes withheld from the wages
of the debtor's employees.

Pacific National has been followed by this Court in Werner v.
United States, supra, by the Sixth Circuit in Mueller v. Nixon,
470 F. 2d 1348 (1972), and by the Seventh Circuit in Adams v.
United States, 504 F. 2d 73 (1974).

The fact that taxpayer here did not perform the ministerial
function of collecting the tax or keeping the corporate books is
unimportant in determining his liability. As the First Circuit
has recognized (Harrington v. United States, 504 F. 2d 1306, 1312,
1315 (1974))--

Liability is not limited to those employees
performing merely mechanical functions of
collection and payment * * *, but extends to
all with responsibility and authority to avoid
the default which constitutes a violation of
the statute; even though more than one person
may be liable. * * *

*

*

*

* * *. * * * an individual need not be in day to day control of the administrative and financial aspects of the business in order to be the responsible person within the meaning of Section 6672, so long as he has the right to control such aspects of the business.

Thus, even if taxpayer (Br. 5) did not sign the company's checks or pay the company's bills, that fact does not preclude him from liability. It is clear that any corporation may have more than one responsible person under Section 6672. Braden v. United States, 442 F. 2d 342 (C.A. 6, 1971), cert. denied sub nom. Bonistall v. Braden, 404 U.S. 912 (1971). Indeed, anyone who is aware of the fact that taxes were owing and nonetheless prefers other creditors is subject to liability under that section. Burack v. United States, 461 F. 2d 1282 (Ct. Cl., 1972). Taxpayer quite clearly falls within that description.

Finally taxpayer's claim (Br. 9) that the corporation did not have sufficient funds to pay the delinquent withholding taxes for the periods in question is without merit. The delinquent withholding taxes for the fourth quarter of 1963 were \$13,082.66. It is undisputed that in December of 1963, Auto Dynamics received \$20,000 to pay delinquent withholding taxes (Tr. 165-166) but that taxpayer withdrew \$17,000 of that amount for his own use. (Tr. 166-167.) The Government introduced the cancelled checks of the corporation (Ex. C-1 through C-21) and its bank statements (Ex. 3) for the fourth quarter of 1963 were also introduced.^{6/}

^{6/} Taxpayer errs when he states (Br. 9) that the checks of the corporation were received into evidence as papers with no probative worth. The following colloquy between the court and

These exhibits show that the corporation had sufficient funds during the periods in question to pay the delinquent withholding taxes. (Op. 4.) Yet as a result of taxpayer's instructions, it failed to do so.

6/ (continued)

Government counsel took place at the end of the trial (Tr. 198-199):

MR. GROSSMAN: Your Honor, the cases are very clear that wilfull in a civil statute means basically knowledge of what is transpiring and does not require any bad intent. Knowledge of the delinquency and a continued preference of creditors over the United States constitute wilfullness under the statute, and I believe the Government's evidence has indicated knowledge and the preference of creditors over the United States, in that they were paid and continued to be paid even long after the quarters that are involved here.

THE COURT: I assume the checks, this big exhibit, is what you rely on for that?

MR. GROSSMAN: Well, the checks on their faces indicate that very clearly, that there was a preference of creditors over the Government.

THE COURT: All right. I will take the case under advisement.

The court specifically found (Op. 4) that substantial sums were available to pay the withholding taxes.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
ELMER J. KELSEY,
JEFFREY S. BLUM,
Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

JAMES M. SULLIVAN, JP.,
United States Attorney.

JANUARY, 1976.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 20th day of February, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

Sheldon G. Kall, Esquire
3522 James Street
Syracuse, New York 13206

Gilbert E. Andrews
GILBERT E. ANDREWS,
Attorney.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) Requirement.--The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

* * *

SEC. 3402. INCOME TAX COLLECTED AT SOURCE.

(a) [as amended by Sec. 2(a), Act of August 9, 1955, c. 666, 69 Stat. 605, and Sec. 302(a), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19] 7/ Requirement of Withholding.--Every employer making payment of wages shall deduct and withhold upon such wages (except as provided in subsection (j)) a tax equal to 14 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b)(1).

* * *

(d) Tax Paid by Recipient.--If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the tax under this chapter, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

* * *

7/ The Revenue Act of 1964 changed the rate of withholding from 18 percent to 14 percent, effective (Sec. 302(d) March 5, 1964.

SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

*

*

*

(b) Person Defined.--The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) General Rule.--Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

*

*

*